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No. 97-714

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

TERRA INTERNATIONAL, INC., *ET AL.*, PETITIONERS,

v.

MISSISSIPPI CHEMICAL CORPORATION, RESPONDENT.

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SUPREME COURT, U.S.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONERS

In its opposition, MCC fails to controvert any of the grounds that warrant this Court's review of the questions presented. MCC acknowledges the enormous amount of judicial and private resources now wasted on collateral litigation over the interpretation of forum selection clauses. It argues, however, that these disputes should continue to be resolved under a hodgepodge of federal common law rules that courts may accept or reject based on their unstructured appraisal of the particular circumstances of each case. But this Court's decisions make clear that state law must provide the standards — and the predictability — that are now so notably absent from this area of the law.

MCC does not deny that the questions presented are of great practical importance. Instead, it opposes further review of the Eighth Circuit's decision on three principal grounds. *First*, MCC claims that the questions presented were not properly raised by Terra below. *Second*, MCC argues that the court of appeals properly decided the scope of the forum selection clause as a matter of federal common law. It contends that this Court's ruling in *Stewart Org.* v. *Ricoh Corp.*, 487 U.S. 22 (1988), that federal law governs the enforceability of forum selection clauses in federal court, should be broadly extended to cover the *meaning* of those clauses. *Third*, MCC claims this Court is powerless to clarify the legal rules for interpreting contractual forum clauses because this is an area of the law that "does not lend itself to the formulation of rigid rules." Br. in Opp. 14.

As demonstrated below, MCC's opposition to the petition is unfounded. MCC cannot seriously deny that the questions presented have divided the lower courts, or that the view adopted by the Eighth Circuit and other circuits that federal law governs the interpretation of forum selection clauses is hopelessly out of step with this Court's decisions in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), and *Atherton* v. *FDIC*,

117 S. Ct. 666 (1997). This case provides an ideal vehicle for the Court to now clarify this important area of the law.

I. The Questions Presented Were Adequately Raised And Actually Decided By The Court Below And Are Properly Before This Court.

MCC's argument that the first question presented was not properly raised below is simply wrong. Terra repeatedly urged the court of appeals to apply the *very* state law precedents that now form the basis for the first question presented to this Court. Compare Terra C.A. Br. 43-44 with Pet. 17-18. See also Terra C.A. Reply Br. 14-15 & n.9. In its opening brief to the court of appeals, Terra argued at length that its claims in this diversity case sounded in tort under governing Iowa and Mississippi case law, and thus did not arise under the License Agreement (and hence were not covered by the forum selection clause), because "while contract law governs the defeated commercial expectations associated with a defective product, tort law principles apply where the defective product causes an unexpected hazard that 'could not have been reasonably anticipated by the contracting parties.'" Terra C.A. Br. 43-45 & n.18.

Notwithstanding Terra's explicit reliance on state law decisions as the governing precedent in this case, the court of appeals decided the issue solely as a matter of federal common law, without *any* regard for principles of state law. Terra then petitioned the court of appeals for rehearing on the ground (among others) that the court had improperly ignored Iowa and Mississippi law and wrongly based its decision on federal common law rules. As Terra argued on rehearing, "[e]ven though federal law is applied to the question of whether a forum selection clause is enforceable in federal court, state law should be applied in deciding how a forum selection clause should be interpreted. There is no federal common law of contract

interpretation." Terra Pet. for Rhg. 9-12 & nn.4-6. Thus, MCC's claim that Terra somehow failed to preserve the first question presented is simply wrong, and should be rejected.

MCC is equally wide of the mark in suggesting (at 14) that the second question presented — whether, even assuming federal common law applies, the Eighth Circuit adopted an erroneous interpretive rule — was not properly presented to the court of appeals. The proper standard to be applied in deciding whether the forum selection clause governs the tort claims at issue here was one of the *central* points of Terra's argument in the court of appeals (see Terra C.A. Br. 29-45; Terra C.A. Reply Br. 8-18; Terra Pet. for Rhg. 4-14), and was the very issue decided by the court of appeals. See Pet. App. 10a-15a. In short, both questions presented were adequately preserved below and are now properly before this Court. See, *e.g.*, *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *United States* v. *Williams*, 504 U.S. 36, 41-42 & n.2 (1992); *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

II. The Eighth Circuit's Use Of Federal Common Law Conflicts Irreconcilably With This Court's *Erie* Decisions And The Law In Other Circuits.

MCC makes no serious attempt to explain how the Eighth Circuit's use of federal common law can be squared with this Court's restrictions on federal common law in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), and *Atherton* v. *FDIC*, 117 S. Ct. 666 (1997). All that MCC offers is the observation (at 11-12) that neither *O'Melveny* nor *Atherton* involved a forum selection clause. But, as explained in the petition (at 13-16), *O'Melveny* and *Atherton* squarely held that federal common law rules may be developed and applied only "where there is a 'significant conflict between some federal policy or interest and the use of state law'," and "the scope of judicial displacement

of state rules turns upon such a conflict." 512 U.S. at 87-88. MCC fails to come to grips with this rule, and fails to cite *any* federal law or interest that would even arguably be threatened if forum selection clauses were interpreted in accordance with the governing state law. Thus, it remains apparent that the Eighth Circuit's decision squarely conflicts with *O'Melveny* and *Atherton*, and that its erroneous adoption of a federal common law rule of decision would be a sufficient reason in and of itself to grant certiorari, even if, as MCC claims, there were no circuit split.

In fact, however, there is a circuit split over whether interpretation of forum selection clauses should be governed by state or federal law. MCC's attempts to mask this inter-circuit conflict are unavailing. The very cases cited and discussed by the Eighth Circuit repeatedly recognize that the "circuit courts of appeals have reached conflicting results" on this important question, which was left open by the Court in *Stewart*. See, *e.g.*, *Manetti-Farrow, Inc.* v. *Gucci America, Inc.*, 858 F.2d 509, 514 (9th Cir. 1988); *Lambert* v. *Kysar*, 983 F.2d 1110, 1121 (1st Cir. 1993).[1] See also *Northwestern Nat'l Ins. Co.* v. *Donovan*, 916 F.2d 372, 374 (7th Cir. 1990) (Posner, J.). MCC claims that these decisions are distinguishable because they involved *forum non conveniens* motions rather than motions to transfer under § 1404(a). Br. in Opp. 11. As the Eighth Circuit's reliance on these very cases reveals, however,

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[1] MCC belittles (at 9-10) the First Circuit's recognition in *Lambert* of the pervasive inter-circuit split, noting its citation to the Eighth Circuit's previous decision in *Farmland Indus. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848 (8th Cir. 1986), which treated the application of a forum selection clause as a matter of state law. The Eighth Circuit decision in this case to shift course and treat the issue as one of federal common law hardly advances MCC's cause. Rather, it directly confirms the need for this Court's review, given the continuing uncertainty in the lower federal courts over the first question presented.

MCC's distinction is one without a difference. In both closely related situations the identical question is raised: whether the meaning of a forum selection clause should be treated as a procedural question governed by federal law or as a substantive question governed by state law under *Erie*.

MCC also claims that there is no conflict because no circuits have decided the meaning of forum selection clauses as a matter of state law. In fact, as Terra explained in the petition (at 12), the Second and Third Circuits have done precisely that. In *Jumara* v. *State Farm Ins. Co.*, 55 F.3d 873 (3d Cir. 1995), the court applied Pennsylvania law to interpret the meaning of a forum selection clause. MCC argues (at 10) that *Jumara* is distinguishable because the contract there contained a choice of law provision invoking Pennsylvania law. But that is no distinction at all, since the Agreement here *also* contained a choice of law provision invoking state law, which the court of appeals ignored in favor of a federal rule of decision.[2]

Likewise, the Second Circuit in *Karl Koch Erecting Co.* v. *New York Convention Center Dev. Corp.*, 838 F.2d 656, 658-659 (2d Cir. 1988), interpreted the meaning of a forum selection clause in accordance with state law. MCC argues that *Koch* should be disregarded because the state law principles cited by the court were "uncontroversial." Br. in Opp. 10 n.6.

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[2] MCC's suggestion that the outcome below would not have been different under state law is demonstrably wrong. MCC claims that the Eighth Circuit's decision merely involved "the basic principle that the intentions of the parties control interpretation of contractual provisions." Br. in Opp. 12. In fact, the court's decision turned entirely on its adoption of the First Circuit's rule of construction that tort claims arise under a contract so long as they "involve the same operative facts as would a parallel claim for breach of contract." Pet. App. 13a-14a. As explained in the petition (at 16-18), it is *this* rule that squarely conflicts with the laws of both Iowa and Mississippi — a point MCC does not contest.

The critical point, however, is that the Second Circuit looked to state law to judge the meaning of the forum selection clause rather than to federal common law rules embraced by the Eighth Circuit.[3]

Ultimately, MCC's opposition boils down to its contention (at 7-8) that the court of appeals properly decided this case as a matter of federal common law, and that this Court's decision in *Stewart* should be broadly extended to authorize the creation of federal common law contract rules for interpreting forum selection clauses. But that argument merely begs the question presented, and provides no basis for opposing the petition. Moreover, as MCC's own brief confirms, the result it advocates is simply untenable. Indeed, MCC concedes (at 8) that rules of contract interpretation are solely the domain of state law. It argues, nonetheless, that federal law should be used to determine whether a contract claim has been "artfully pleaded" in order to avoid application of a forum selection clause. *Id.* at 9. This fall-back position is no more tenable. Whether a contract claim has been "artfully pleaded" as a tort claim is *wholly* a function of state law doctrines defining the meaning of the contract, the source of the duties breached, and the nature of the tort claims being asserted.

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[3] MCC accuses Terra of misciting the Iowa Supreme Court's decision in *Davenport Mach. & Foundry Co. v. Adolph Coors Co.*, 314 N.W.2d 432, 437 (1982), for the proposition that forum selection clauses are unenforceable under Iowa law. See Br. in Opp. 8 n.4. In fact, that is *precisely* what *Davenport* held: "[t]raditionally Iowa has held such clauses to be unenforceable." *Id.* at 435. While recognizing that Iowa's rule is in the minority, the Court nonetheless reaffirmed that such clauses "are not legally binding in Iowa." *Id.* at 437. Iowa's rule of unenforceability runs directly contrary to the interpretive rule adopted by the Eighth Circuit as a matter of federal common law, under which forum selection clauses are given the broadest possible interpretation.

In short, while *Stewart* held that the enforceability of forum selection clauses should be governed by § 1404(a), the extent to which § 1404(a) displaces state rules of contract interpretation must be determined in accordance with the principles later articulated by this Court in *O'Melveny* and *Atherton*. This case presents the Court with an ideal opportunity to resolve the confusion over this important and recurring issue.

III. The Circuits Also Are In Conflict Over The Extent To Which Common Law Tort Claims Are Governed By Contractual Forum Selection Clauses.

MCC's brief offers nothing to reconcile the conflicting federal common law rules the circuits have adopted to determine whether tort claims are governed by forum selection clauses. Indeed, one need look no further than the decision of the Eighth Circuit to recognize "the conflicting circuit case law addressing this issue." *Graham Tech. Solutions* v. *Thinking Pictures, Inc.*, 949 F. Supp. 1427, 1433 (N.D. Cal. 1997).[4]

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[4] MCC attempts to downplay the *Graham* court's recognition of the inter-circuit conflict by claiming that it involved only a "distinguishable" Second Circuit decision. Br. in Opp. 15 n.10. In fact, the court's discussion canvassed decisions from the Second, Seventh and Ninth Circuits, and concluded as follows: "[t]his court has considered the conflicting circuit case law addressing this issue, and determines that the better view, and the one that is consistent with the Ninth Circuit approach adopted in *Manetti-Farrow*, is the one which upholds the forum selection clause where the claims alleged in the complaint *relate to* the interpretation of the contract." 949 F. Supp. at 1433. MCC also miscites (at 15 n.10) the Sixth Circuit's decision in *General Envtl. Science* v. *Horsfall*, 25 F.3d 1048, 1994 WL 228256 (6th Cir. 1994), as favoring the *Lambert* rule. In fact, in the very sentence *after* the passage quoted by MCC, the court held, consistent with the Ninth Circuit's rule in *Manetti-Farrow*, that the tort claims there were not governed by the forum selection clause because the case was not "fundamentally a contract action with related, yet subsidiary claims; rather, it is one for which the [contract] (and its terms) are simply one relevant, but not dominant, component." *Id.* at *8. Review of the remaining cases cited in the petition

This confusion is perfectly understandable because the lower courts do not know what body of law they are supposed to apply, and because there is no federal law or policy that can possibly serve as a guide to the formulation of any cohesive or predictable rules.

MCC argues (at 15) that certiorari should be denied because the circuits may someday realign themselves and harmonize the conflicting rules they now apply to interpret forum selection clauses. But this body of law is rapidly diverging, not converging, and without this Court's review contracting parties will have no means of predicting where their disputes should be resolved, thus stripping forum selection clauses of the very benefits they were crafted to serve. If there is no uniformity now, nearly a decade after *Stewart*, there is scant hope for realignment in the future.

MCC also insists that there is nothing this Court could do to clarify the law in this area because it "does not lend itself to the formulation of rigid rules." Br. in Opp. 14. To the contrary, this Court easily can stem the tide of wasteful venue litigation by instructing courts to look to well-defined principles of state law that already are used to interpret contracts, and thus to distinguish tort claims from those that truly sound in contract and should be litigated in the parties' contractually selected forum.[5] However, even if this Court were to conclude that

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confirms the existence and prevalence of this inter-circuit conflict.

[5] MCC wrongly suggests (Br. in Opp. 16) that the questions presented would not be dispositive of venue here because the court of appeals also relied on other provisions of the License Agreement as additional support for its decision. It is apparent from the Eighth Circuit's decision, however, that the additional grounds MCC refers to were insufficient to resolve the proper meaning of the forum selection clause. The fact that the court ultimately was forced to resort to the First Circuit's default rule as a tiebreaker confirms

forum selection clauses should be the subject of federal common law, this Court already has fashioned a clear standard in *East River Steamship Corp.* v. *Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), which is well adapted to distinguish claims that are properly subject to forum selection clauses from those that are not. Application of that rule clearly mandates reversal here.

A straightforward application of this Court's economic loss decisions confirms that Terra's product liability claims against MCC sound in tort, not contract, and thus are not governed by the parties' forum selection clause. Indeed, MCC itself recognizes that Terra's claims are "tort claims" under both Iowa and Mississippi law. See Br. in Opp. 13. Whether Terra could have brought a contract action against MCC is simply irrelevant. See *Saratoga Fishing Co.* v. *J.M. Martinac & Co.*, 117 S. Ct. 1783, 1789 (1997).[6]

Throughout its brief, MCC defends the Eighth Circuit's ruling on the ground that it promotes a federal interest in preventing litigants from "artfully pleading" tort claims to avoid forum selection clauses. Yet, as explained in the petition, even if such an interest existed (and MCC has cited nothing to show that it does), the problem of "artful pleading" would be eliminated completely by applying the principles set forth in state decisions or the economic loss doctrine articulated in *East River*. Although *East River* did not involve a forum selection

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that the questions presented would indeed be dispositive of venue, since under state law the "tie" would have been resolved in Terra's favor.

[6] MCC questions Terra's description of this case as a "product liability action" because "MCC did not manufacture a product, but instead provided only a basic design." Br. in Opp. 9 n.5. In fact, under Iowa law, which governs Terra's product liability claims, a "designer and licensor" of a defective product is equally subject to strict liability. *Bredberg* v. *Pepsico*, 551 N.W.2d 321, 327 (Iowa 1996) (citing Iowa Code § 613.18 (1993)).

clause, its analysis is highly relevant here because it provides a coherent means of distinguishing tort claims from those that actually sound in contract. Application of the *East River* test in this case confirms that Terra's product liability claims are not governed by the parties' contractual forum selection clause.

In sum, MCC offers nothing to dispel the urgent need for this Court to clarify the body of legal rules that governs the interpretation of contractual forum selection clauses. Without such guidance, judicial and private resources will continue to be wasted on disputes that can and should be resolved more quickly and predictably.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary disposition on the first question presented in light of its recent decisions in *O'Melveny* and *Atherton*.

Respectfully submitted.

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